UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERICK J. FEITSHANS, an individual;
STEVE HODGES, an individual,

Case No. 06 CIV 2125 (SAS)

Plaintiffs,

v.

MICHAEL KAHN, an individual;
LAURA KAHN, a individual;
MICHAEL ASHKIN, an individual;
WINTER FILMS, LLC, a New York
Limited liability Company; IKAN
PRODUCTIONS, a New York
Corporation; and DOES 1-10 inclusively,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

It appears that the gist of defendants' motion to dismiss is that:

1) The issue of alter ego has been litigated and determined in a prior proceeding, thus precluding relitigation of the issue pursuant to the doctrine of res judicata;

2) Plaintiffs have had a full and fair opportunity to litigate the issue of alter ego and are now collaterally estopped from asserting that issue here; and,

3) Plaintiffs are seeking to relitigate the arbitration award.

In addition, defendants argue that:

4) The Alter Ego Defendants admit and argue that they are privies of Entity Defendants [Defendants' moving papers page 12];

5. Because the Alter Ego Defendants are privies of the Entity Defendants, plaintiffs are barred from seeking the damages, awarded them by the arbitrator and confirmed by the court, against the Entity Defendants from the Alter Ego Defendants.

In opposition, plaintiffs contend that:

1. The alter ego issue was never litigated in any prior proceeding.

2. There has never been a final judgment as to whether the Alter Ego Defendants were the alter egos of Entity Defendants.

3. Plaintiffs have never had a full and fair opportunity to litigate the issue of whether the Alter Ego Defendants were the alter egos of the Entity Defendants in that the notice of the hearing on the petition was not adequate and Plaintiffs never had an opportunity to litigate that issue.

4. Because the Alter Ego Defendants have admitted that they are privies of the Entity defendants, they are estopped and barred from asserting they are not bound by and liable for the judgment against the Entity Defendants.

5. Plaintiffs request that the arbitrator's award be confirmed and judgment be entered against the Alter Ego Defendants pursuant to the holdings in **Ammcon v. Kemp**, 826 F.Supp 639 (E.D.N.Y. 1993) and **Omaha Indemnity v. Royal American Managers**, 755 F.Supp. 1451 (W.D.Mo. 1991).

STATEMENTS OF MATERIAL FACTS

Plaintiffs do not dispute Defendants' version of the Facts in general but request that the court recognize that Defendants' version is bent with a bias toward Defendants. Plaintiffs specifically dispute the following:

Page 3, last sentence of first full paragraph: This is not a fact, it is an opinion of defendants' counsel which is incorrect. "The only way under existing law that Plaintiffs could have compelled non-signing Kahns to arbitrate was to rely on a theory of alter ego." This is plain nonsense. There are at least three other viable theories, i.e. agency, estoppel and assumption. The actual reason by Plaintiffs was that Michael Kahn and Laura Kahn were officers of the Entity Defendants named and their knowingly tortuous conduct [by an officer of a corporation] was actionable personally against those officers. That was the only theory under which the arbitration was initiated by Plaintiffs against the Kahns. In fact, there is no actual evidence as to why the Kahns were named becau7se there was no hearing on the issue.

Page 4, first full paragraph: This again is merely an opinion of counsel.

Page 5, first full paragraph beginning with "Plaintiffs again raised the alter ego issue . . ." The alter ego had never been raised in any prior proceedings.

Page 5, last line of page: Plaintiffs were convinced then and are still convinced that the United States District Court for the Central District of California had jurisdiction over Michael Ashkin and Laura Kahn. The court found jurisdiction over Michael Kahn.

Page 6 last sentence: Plaintiffs do seek to hold Defendants liable on the theory of alter ego but contrary to the "Facts" as reiterated by Defendants' counsel, that issue had never been raised.

PLAINTIFF'S CLAIMS IN THIS ACTION

Defendants set forth Plaintiffs' claim with the degree of accuracy as expected in any motion to dismiss showing a certain expected bias against Plaintiffs. The most important portion of that section of the moving papers is at Page 9 the next to last sentence. That sentence states without equivocation that " . . . the Kahns or any remaining Defendants, ***all of whom are in privity*** with the Entity Defendants and the Kahns." Additionally, these Defendants stated "The Alter Ego Defendants are in privity with the Entity Defendants, parties to the prior arbitration with Plaintiffs." (Defendants' moving papers page 12) The admission that the Alter Ego defendants are privies of the Entity Defendants casts a completely different aspect and profile to this action and brings the Third cause of Action in sharper focus.(see Points 4 & 5 in Plaintiffs' opposition at page 1-2)

DEFENDANTS HAVE IMPROPERLY FILED A MOTION TO DISMISS AND AN ANSWER AT THE SAME TIME

It is difficult to comprehend under what legal theory or what rule of court or what rule of civil procedure, Defendants filed a **Federal Rules of Civil Procedure Rule 12(b)(6)** motion to dismiss and simultaneously filed an Answer pursuant to **F.R.Civ. P. Rule 7**. The **Rule 12(b)(6)** motion was filed on behalf of the Alter Ego Defendants as to all causes of action; at the very same time, these very same Alter Ego Defendants filed an Answer as to all of the causes of action. Under the rules of pleading, it would appear that the Answer mooted the Rule 12(b)(6) motion because filing an Answer closes the pleadings; the operative pleadings are the Second Amended Complaint and the Answer to that complaint. All motions pending related to the pleadings are moot once the Answer has been filed. If the Motion to Dismiss was filed before the Answer, it was mooted when the Answer was filed; if the Motion to Dismiss was filed after the Answer, it is an improper motion.

Rule 7 provides for six types of pleadings, of which only two apply to this matter, i.e. complaint and answer; a motion to dismiss is not a form of pleading. **Maldonado v. Dominguez**, 137 F.3d 1, 11 fn. 9 (1st Cir. 1998) The function of an Answer is to close the pleading and place the action "at issue" while the function of a **Rule 12(b)(6)** motion to dismiss is to challenge the sufficiency of the pleadings and have the action dismissed. Pursuant to **F.R.Civ.P. Rule 7** and **8**, the function of an Answer is to inform the Court and the other parties whether the defendant(s) admit or deny the averments as well as to make known any affirmative defenses that a party believes it might have. A **Rule 12(b)(6)** motion to dismiss, on the other hand, requests the Court dismiss the matter because the complaint is not sufficient and the averments do not state a claim upon which the court can grant relief. A **Rule 7/8** Answer and **Rule 12(b)(6)** motion to dismiss may not be pleaded concurrently in that either the pleadings are sufficient or they are not; the Answer explicitly means that the pleadings are sufficient while the motion to dismiss challenges the sufficiency of the pleading.

However, there is one exception where an Answer and a **Rule 12(b)(6)** motion to dismiss may be submitted concurrently. Where the defendant chooses to reply by Answer to some of the averments while at the same time challenge other causes of action and/or request dismissal of those other causes of action. Generally under these circumstances, a defendant will file an Answer which includes affirmative defenses instead of filing a **Rule 12 (b)(6)** motion to dismiss. The party subsequently can file either a **Rule 12(c**) motion for judgment on the pleading or a **Rule 56** motion for summary judgment as to those causes of action which the party seeks dismissal. It is very rare and the courts look generally with disfavor where a defendant files an Answer to some causes of action and a Motion to Dismiss as to other causes of action.

In the case at bar, defendants have filed an Answer to the entire complaint (each averment and each cause of action as to all defendants] and at the same time, moved to dismiss the entire complaint [all defendants and all causes of action]. Defendants asserted in their Answer the exact same issues as they asserted in the motion to dismiss. In Paragraph 133 of the Answer, as an affirmative defense, defendants assert the defense of res judicata and collateral estoppel, the exact same allegations that are made in the motion to dismiss. In Paragraph 130 and 131, Defendants assert that the issue of alter ego has been determined in the Demand for Arbitration; that exact same allegation is made in the motion to dismiss. Be□ause the issues in the **Rule 12(b)(6)** motion have been alleged and preserved in the Answer by affirmative defenses, the **Rule 12(b)(6)** motion is moot and should be taken off calender.

The major problem with filing a motion to dismiss and an Answer to the same averments at the same time is that in a motion to dismiss the allegations in the complaint are accepted as true but in the Answer, Defendants deny those very same allegations. This type of alternative contradictory simultaneous pleading is not permitted.

Based on the foregoing, the **Rule 12(b)(6)** motion to dismiss should be taken off calendar because it is improper and by filing an Answer, the motion is moot.

SUMMARY OF ARGUMENT

Defendants Michael Kahn, Laura Kahn, Michael Ashkin and Darby Group (hereinafter referred to as "Alter Ego Defendants") admit and concede that they are in privity with Winter Films and/or Ikahn Productions (hereinafter referred to as "Entity Defendants"). They further argue that because they are privies, pursuant to the doctrines of res judicata and collateral estoppel, they are not subject to any further litigation on these issues. If they are truly privies of the Entity Defendants, they also are bound by the judgment against the Entity Defendants and it follows that judgment, as a matter of law, must be entered against the Alter Ego Defendants in favor of Plaintiffs. Privies are bound by and liable for the judgments against their privy.

In the alternative, Plaintiffs argue that the issue of alter ego has never be raised, discussed, argued or adjudicated in any prior proceeding. In fact, Plaintiff Feitshans, who lives in California, were not served with notice of the Order to Show Staying Arbitration until 7:15 p.m. on December 3, 2002 and the hearing on the OSC was held in New York on December 6, 2002 at 9:30 a.m. The service on Plaintiff Hodges was not effective until December 14, 2002, eight days after the hearing on the Petition. Certainly less than an opportunity for a full and fair hearing on the issue.

ARGUMENT

ALTER EGO DEFENDANTS ARE PRIVIES/ALTER EGOS OF THE ENTITY DEFENDANTS AND ARE THEREFORE LIABLE FOR THE JUDGEMENTS AGAINST THE ENTITY DEFENDANTS

It is the general rule the privies/alter egos are liable for the judgment entered against the Defendants. In **Ammcon v. Kemp**, 826 F.Supp 639 (E.D.N.Y. 1993) the court found that HUD was in privity with the developer and therefore, as a matter of law, was the alter ego of HUD. Additionally as a privy and alter ego of the developer, HUD was also liable for the change orders of the developer and any liability that attached to those change orders. In **Omaha Indemnity v. Royal American Managers**, 755 F.Supp. 1451 (W.D.Mo. 1991) plaintiffs asserted and the court agreed that the privies of the defendants were not only bound by the judgment against the defendants but also liable for the judgment. The concept of privity recognizes that a major shareholder often is the alter-ego of the corporation, and privity can be presumed. **Mitchell Investment v. Federal Saving & Loan Insurance Corp**., 741 F.2d 107, 111 fn.9 (6th Cir. 1984)

Defendants state as a matter of fact that the Alter Ego Defendants are privies of the Entity Defendants. "The Alter Ego Defendants are in privity with the Entity Defendants, parties to the prior arbitration with Plaintiffs." (Defendants' moving papers page 12) In that the Alter Ego Defendants are in privity with the Entity Defendants, these Alter Ego Defendants are, as a matter of law, liable for the judgments against the Entity Defendants.

Generally, the finding of privity of a parent company with its subsidiary and/or the finding of privity between the officers and/or shareholders of a company, also supports a finding of alter ego. Michael and Laura Kahn as well as the other individual defendants are now claiming they are in privity with the Entity Defendants. They did not make that claim at the hearing for a stay in the New York Supreme Court; in fact, they argued they were not obligated to arbitrate because they were not signatories and deliberately and consciously avoided the issue of privity and alter ego. Using the same type of rationale used by Defendants in their moving papers, they argued, by implication, that they were not privies to the Entity Defendants in that if they had told the court that they were privies of the Entity Defendants and knew they were bound by and liable for the judgment of the arbitrator, they would have been held to arbitrate the claims and be subject to and liable for the judgment. By making this admission now, defendants essentially contradict their own argument that they were not subject to arbitration and that the alter ego issue was litigated in the prior proceedings.

It is very clear that the argument was never made to the New York Supreme Court and by refusing to make that argument and inform the court of their privity to the Entity defendants, the Kahns cannot stand before this court and argue that by not making that argument in the state court, they effectively implied they were in privity with and/or the alter ego of the Entity Defendants. If, in fact, Michael and Laura Kahn are in privity (as they now claim in fn. 7 on page 21 of their moving pages) with the Entity Defendants and pursuant to these Defendants' argument in this motion, that non-signatories to an agreement to arbitrate who are in privity to the Entity defendants can be forced to arbitration, these defendants either misled the New York Supreme Court or they are attempting to perpetrate a fraud on this Court.

The Alter Ego Defendants cannot have it both ways: either, 1) they were not subject to arbitration because they were non-signatories and were not privies to the Entity Defendants and are subject to this action, or 2) they are not subject to this action because they were privies to the Entity Defendants and are bound by and liable for the judgment against the Entity Defendants.

Plaintiffs had always taken the position that the issue of privity or alter ego had never been raised at the hearing for a stay of the arbitration by any party and Defendants are estopped from asserting the fact they are not subject to this action. Now that defendants have admitted they are privies and are bound by and liable for the judgment, Plaintiffs request the court issue and enter judgment in the amount prayed for against the Alter Ego Defendants in that both parties and their privies are bound by and liable for the judgment.

Based on the foregoing, the Alter Ego Defendants, who are privies/alter egos of the Entity Defendants are bound by and liable for the judgment entered against the Entity Defendants. Plaintiffs request the Court, sua sponte, order judgment be entered, pursuant to the Third Cause of Action, against Michael Kahn, Laura Kahn, Michael Ashkin and Darby Group Companies in the amount prayed for below.

THE ISSUE OF ALTER EGO HAS NEVER BEEN RAISED BY ANY PARTY TO THIS ACTION IN ANY PRIOR PROCEEDING.

Throughout their moving papers, Defendants argue that the issue of alter ego has been previously litigated and adjudicated. However, a careful review of the exhibits offered by Defendants shows that the issue of alter ego has never been mentioned at any time by any party in any proceedings, either explicitly or implicitly. Exhibit D is the Demand for Arbitration and there is no allegation of alter ego. Exhibit E is the Order to Show cause filed by Defendants Michael Kahn and Laura Kahn. The only basis for the request for the stay is that Michael Kahn and Laura Kahn were not signatories to the agreement to arbitrate and therefore not bound by the agreement to arbitrate. "By reason of the above, Petitioners are not parties to the arbitration agreement contained in the [Hodges][Feitshans] Agreement and the court should grant the within application permanently staying the arbitration against petitioners." (¶ 9 at Page 3 of Exhibit E) "Our attorneys advise us that we cannot be bound by an agreement we did not sign."(¶ 16 at Page 4 of Exhibit E) [1]

[1] That argument raises the issue of whether a non-signatory to an arbitration agreement can be forced to arbitrate if that party is in privity to the signatory party. A line of cases hold that a non-signatory privy can be forced to arbitrate. It is noteworthy that Defendants argued to the New York Supreme Court that they were not obligated to arbitrate because they were not signatories and now they argue that they should be protected by res judicata and collateral estoppel because they were privies but they were not obligated to arbitrate because they were not signatories. This argument seems at minimum, disingenuous, if not a direct attempt to mislead one or both courts.

The Orders of the court did not allude to, imply, mention or suggest that any other rationale was used to grant the stay other than that Michael Kahn and Laura Kahn were not signatories to the agreement to arbitrate.

In spite of the above, Defendants argue that the issue of alter ego had actually been litigated and adjudicated and base that argument on two different theories. Initially, Defendants argue that because Michael Kahn and Laura Kahn were named in the original arbitration demand, the issue of alter ego was raised by plaintiffs. Defendants argue "[A]lter ego was the only plausible theory Plaintiffs could have used to compel the Kahns, as non-signatories, to arbitrate. " (Defendants' moving papers Page 21 Fn. 7) Actually, Michael Kahn and Laura Kahn were named solely because they were officers of the Entity Defendants, not as alter egos of the Entity Defendants. There is considerable difference between being the alter ego of a corporation and being an officer of that corporation. It was not until discovery was completed and arbitration hearing was in process that plaintiffs learned of the extent that Alter Ego Defendants were the alter egos of the Entity Defendants.

Defendants then argue that the issue was necessarily litigated and adjudicated because plaintiffs had an opportunity to litigate the issue. Plaintiffs argue that they were never given the opportunity to litigate the issue of alter ego. Plaintiffs did not oppose the petition to stay the proceedings as to the Kahns and a default was entered. "Ordered that the motion be and the same is hereby granted on default and, . . ." (Exhibit F) Some types of judgments are not given collateral estoppel or res judicata effect because the court did not get the benefit of deciding the issue in an adversarial context. In the case of a default judgment, for example, a party may decide that the amount at stake does not justify the expense and vexation of putting up a fight. The defaulting party will certainly lose that lawsuit, but the default judgment is not given collateral estoppel or res judicata effect. **Spilman v. Harley**, 656 F.2d 224, (6th Cir. 1981); **Commonwealth of Massachusetts v. Hale**, 618 F.2d 143 (1st Cir. 1980); **Matter of McMillan**, 579 F.2d 289 (3d Cir. 1978)

In the case at bar, the decision to stay the arbitration as to the Kahns was taken upon default and neither res judicata nor collateral estopped should apply because the petition to stay (the pleading) did not raise the issue of alter ego and the issue of alter ego was never raised thereafter.

Initially " . . . the party asserting preclusion "bears the burden of showing with clarity and certainty what was determined by the prior judgment," **Clark v. Bear Stearns & Co.**, 966 F.2d 1318, 1321 (9th Cir. 1992), so that "[i]ssue preclusion will apply only if it is quite clear" that this requirement has been met, **Colon v. Coughlin**, 58 F.3d 865, 869 (2d Cir. 1995) (construing New York law). Defendants have the burden of showing that the issue of alter ego was determined in a prior proceeding and they must make that showing with clarity and certainly. Defendants have failed to show with the requisite clarity and certainty that the issue of alter ego was determined in a prior proceeding. Defendants argument is based on pure speculation and questionable implications.

Showing that the applicable procedural rules did not permit assertion of the claim in question in the first action of course also suffices to show that the claim is not barred in the second action. **Pike v. Freeman** 266 F.3d 78, (2nd Cir. 2001) The procedural rule that a non-signatory to an agreement to arbitrate cannot be forced to arbitrate the claim is sufficient to show that the second action is not barred. Plaintiffs were barred from litigating the issue of alter ego when the New York Supreme Court held that Defendants Michael and Laura Kahn could not be forced to be subjected to the proceeding because they never agreed to do so.

Defendants cited Norris v. Grosvenor Marketing Ltd., 803 F.2d 1281 (2nd Cir. 1986) to support their argument.[2] "New York has adopted a two-prong "full and fair opportunity" test for deciding whether an issue has been determined by previous litigation. (citation omitted) First, the issue dispositive of the present action must have been necessarily decided in the prior action. This does not mean that the prior decision must have been explicit. `If by necessary implication it is contained in that which has been explicitly decided, it will be the basis for collateral estoppel.' (Citation omitted) Second, there must have been a full and fair opportunity to contest the previous decision." **Norris v. Grosvenor Marketing Ltd.**, 803 F.2d 1281, 1285 (2d Cir. 1986)

The first prong of the Norris test has not been satisfied. The issue of alter ego has not be determined in any prior proceeding. Even if the court uses the implicit rather than explicit standard, there was never any implication that any prior proceeding addressed or decided the issue of alter ego. The New York Supreme Court limited its decision to stay the proceedings to the facts before it, i.e. that Defendants were not signatories to the agreement to arbitrate. There was no other evidence before that court. That court did not have sufficient evidence to make a finding as to whether defendants were or were not the alter egos and/or the privies of the Entity Defendants. The Order was based entirely on the evidence that the Kahns were not signatories and on the default by Plaintiffs; therefore the issue of alter ego is not subject to res judicata or collateral estoppel.

Secondly, if there was, by implication, a determination of the alter ego issue, plaintiffs have not had a full and fair opportunity to contest that determination. The determination was made at a very early stage of the arbitration proceedings (before the arbitration began and before any discovery commenced).

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[2] While plaintiffs' counsel is not an expert in the rules of court of the Southern District of New York, it is a general rule that counsel may not cite unpublished cases in his/her moving pages unless the case presented the law of the case. In Defendants' moving papers, several unpublished cases were cited that are not the law of this case: 1) Amadasu v. Bronx Lebanon Hosp., 2) Sabbagh v. Charles Schwab & Company, 3) Vets North, Inc. v. Libutti, 4) Rice v. Kemper Investments, and 5) E.G.L. Gem Lab. Ltd. v. Gem Quality Institute, Inc.

Res Judicata applies to preclude subsequent litigation if there was a prior proceeding where there was a final judgment on the merits by a court of competent jurisdiction in a case involving the same parties or their privies involving the same claims. This is a four prong test.

1) There was no final judgment as to the issue of alter ego by any court; therefore the first prong of the test fails. However, there was a final judgment as to the claims alleged by plaintiffs in the arbitration; alter ego was not one of the claims. 2) That judgment was entered by the New York Supreme Court, certainly a court of competent jurisdiction. 3) The parties are not the same in that the Alter Ego Defendants were not parties to the arbitration. The question is whether the Alter Ego Defendants as privies are entitled to the protections of the Entity Defendants pursuant to doctrines of res judicata and collateral estoppel. Defendants concede and now admit the Alter Ego Defendants are, in fact, privies of the Entity Defendants. However, at the Stay hearings, there was no mention of that fact. Defendants never argued that the Kahns were , in fact, privies of the entity Defendants and would be bound by the judgment of the arbitrator. Whether the parties are the same and the third prong is satisfied is questionable because of the unclean hands of the Alter Egos Defendants. However, due to the fact that the Alter Ego Defendants now concede that they are privies of the Entity Defendants, plaintiffs have been deprived of an opportunity to state their claims and to have their day in court (arbitration or otherwise) because of the conduct of Michael and Laura Kahn in their request for a stay , they failed to raise this issue or inform the court theat they were privies to the Entity Defendants. The final prong of the Norris test asks whether the claims are the same. In the case at bar, the claims are completely different. The claim for breach of contract has been

determined by the arbitrator; however, the claims of whether the Alter Ego Defendants are the alter ego of the Entity Defendants has never been raised, argued or decided in any prior proceeding.

Based on the foregoing, Defendants have not satisfied the four prongs of the Norris test and this motion should be denied.

" . . . the doctrine of collateral estoppel has limitations to assure that the precluded issue was carefully considered in the first proceeding. For the bar to apply: (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits." **Gelb v. Royal Globe Insurance Company**, 798 F.2d 38, 44 (2nd Cir. 1986) Each of the four prongs of the Gelb test must be satisfied.

The first prong requires that the issue must be identical in both proceedings. The issue of whether the Alter Ego defendants were the alter egos of the Entity Defendants was not an issue in any prior proceedings. Defendants cannot point to any proceedings and show with clarity and certainty that the issue of alter ego was raised in any prior proceedings. The second prong requires that the issue has been actually litigated and decided. The issue of alter ego has not be litigated nor has it been decided in any prior proceedings. 3) Plaintiffs were never given an opportunity to have a full and fair opportunity to litigate the issue in any prior proceedings because the proceedings were stayed as to the Kahns. Because the New York Supreme Court stayed all proceedings against the Kahns, there was no opportunity to litigate an alter ego claim. 4) the issue of alter ego would not have been necessary to support a valid judgment on the merits of the contract claim. None of the requirements of **Gelb supra** are satisfied and therefore collateral estoppel should not be applicable.

PLAINTIFFS NEVER HAD AN OPPORTUNITY FOR A FULL AND FAIR HEARING ON THE ISSUE OF ALTER EGO

Defendants argue the Plaintiffs have a full and fair opportunity to be heard on the alter ego issue; Plaintiffs disagree. "Absent an express agreement to arbitrate, this Court has recognized only "limited theories upon which [it] is willing to enforce an arbitration agreement against a nonsignatory." **Thomson-CSF, S.A. v. American Arbitration Association,** 64 F.3d 773, 780 (2d Cir. 1995). "There are five such theories: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." **Id. at 776** Where the plaintiff is unable to make a threshold showing that the non-signatory was bound to arbitrate under one of the five theories, the non-signatory is considered a non-party to the agreement to arbitrate and the case against it must be dismissed. **Local Union No. 38 v. Custom Air Systems, Inc**, 357 F.3d 266, 268 (2nd Cir. 2004)

To make a threshold showing, the party must have adequate notice of the hearing on the issue. Absent actual service of the notice in time to defend and absent any evidence that the Plaintiffs deliberately attempted to avoid notice of the hearing, Plaintiffs were not given an opportunity for a full and fair hearing on the issues. (see **Hon Kuen Lo v. Gong Park Realty Corp**., 16 A.D.3d 553 [2d Dept 2005]; **Ford v. 536 E. 5th St. Equities**, 304 A.D.2d 615 [2d Dept 2003]

The facts are clear and show that there was never any opportunity for a full and fair hearing on the issues. The Demand for Arbitration was filed and served on October 30, 2002. (Exhibit D) The Notice of Petition to Stay Arbitration was filed on November 21, 2002.(Exhibit E) The Notice of Petition states it was served by certified mail on both plaintiffs on November November 21, 2002. (Exhibit E)[3] It is noteworthy that Defendants have not submitted the executed return receipt for the

[3] The certified package was mailed to the wrong address for Steve Hodges.(see Affidavit of Service by Heriberto Cueva)

packages mailed by certified mail on November 21, 2002.[4] New York law requires personal service.(see **CPLR 313 and 317**)

On December 3, 2002 at 7:15 p.m. Mr. Cueva served Plaintiff Feitshans at his home. He served Mr. Hodges by leaving a copy of the Petition at his residence at 3:50 p.m. on December 4, 2002. Under California law, this type of service is not effected until ten days after a copy of the moving papers are mailed to the party; if a copy of the Petition was mailed to Plaintiff Hodges, the earliest date that service was effected would have been December 14, 2002.[5] That is eight days after the hearing. Both Plaintiffs defaulted because they were not given adequate time to respond to the Notice of the Order to Show Cause.

In addition, the Petition raising the non-signatory issue was served on Plaintiffs at the very beginning of the arbitration process and discovery had not yet been started. Plaintiffs had no opportunity to secure evidence from which they could make the requisite threshold showing. Plaintiffs never had full and fair opportunity to present any evidence on the issue. The hearing in the Supreme Court was held without adequate notice and once the Order to Show cause was granted, the arbitrator could not hear evidence as to the Kahns' alter ego status.

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[4] While Plaintiffs' counsel is not conversant with New York law on this technical issue, California law is clear that the proof of service must be accompanied by the executed return receipt where the service was by certified mail.

[5] It is noteworthy that a copy of the Petition was mailed to Hodges on December 4, 2002 but at the wrong address, i.e. Hodges was served by Cueva in Lake Arrowhead, California but the copy was mailed to Studio City, California. Cueva learned the Studio City address was not a correct address on December 4, 2002 before the Petition was mailed to the Studio City adress..

CONCLUSION

As pleaded in the Third Cause of Action, Plaintiffs request that the arbitrator's award as to Erick J. Feitshans be confirmed against Michael Kahn, Laura Kahn, Michael Ashkin and Darby Group, and judgment be entered in favor of Erick J. Feitshans and against Michael Kahn, Laura Kahn, Michael Ashkin and Darby Group jointly and severally who are in privity with the Winter Films and Ikahn Productions and the amount of the judgment shall be $214,44312 ($172,938.00 plus $41,505.12 interest).

As pleaded in the Third Cause of Action, Plaintiffs request that the arbitrator's award as to Stephen J. Hodges be confirmed against Michael Kahn, Laura Kahn, Michael Ashkin and Darby Group, and judgment be entered in favor of Erick J. Feitshans and against Michael Kahn, Laura Kahn, Michael Ashkin and Darby Group jointly and severally who are in privity with the Winter Films and Ikahn Productions and the amount of the judgment shall be $106,356.13 ($85,769.46 plus $20,356.67 interest) Plaintiffs' Third Cause of Action requests that specific relief.[6] .

In the alternative, Plaintiffs pray the Court set aside Defendants' Motion to Dismiss in that it is mooted by the Answer;

In the alternative, Plaintiffs pray the Court deny this motion to dismiss in that res judicata and collateral estoppel do not apply to the issue of alter ego.

Dated: June 20, 2006

i/s/i Richard Hamlish
Richard Hamlish
Attorney for Plaintiffs

[6] Plaintiffs used the terminology of "alter ego" in the Third Cause of Action. However, if the Court finds that the Alter Ego Defendants are, in fact, in privies of the Entity Defendants and the language of the Third Cause of Action is not specific enough, Plaintiffs request leave to file a Third Amended Complaint stating with the requisite specificity that the arbitrator's award be confirmed and judgment entered against the privies to the Entity Defendants, i.e. the Alter Ego Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury under the laws of the State of California and the United States of America that on June 20, 2006, I electronically filed the foregoing with the United States District Court for the Southern District of New York using the CM/ECF system, which will send notification of such filing to the following:

Richard P. Romeo, Esq.
Salon Marrow Dyckman Newman & Broudy LLP
292 Madison Avenue, 6th Floor
New York, New York 10017

Dated: June 20, 2006

i/s/i/ Richard Hamlish
RICHARD HAMLISH
Attorney for Plaintiffs